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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1980

No. 79-2078

TIMOTHY V. SWARTOUT,

Petitioner,

v.

CIVIL SERVICE COMMISSION OF CITY OF SPOKANE, and CITY OF SPOKANE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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The petitioner, TIMOTHY V. SWARTOUT, respectfully prays that a Writ of Certiorari issue to review the opinion of the Court of Appeals, Division III of the State of Washington entered in this proceeding on January 15, 1980.

OPINIONS BELOW

The opinion of the Court of Appeals, Division III, reported at 25 Wn. App. 174, appears as Appendix "A". That Court's order denying petitioner's motion for reconsideration appears as Appendix "B". The mandate from the Supreme Court of the State of Washington, noting denial of a Petition for Review on April 3, 1980, appears as Appendix "C".

JURISDICTION

The opinion of the Court of Appeals, Division III, was entered January 15, 1980. Timely motion for reconsideration was denied on February 5, 1980. A timely petition for review to the State Supreme Court was denied on April 3, 1980, and this petition for certiorari will have been filed within 90 days of that date. This court's jurisdiction is invoked under 28 U.S.C. Sec. 1257(3).

QUESTIONS PRESENTED

1. Is Swartout, as a municipal police officer, even if considered terminable at will, nevertheless entitled to a "liberty interest" due process hearing where terminated for allegedly falsifying official reports, and such termination and the reasons for it are published in the

press and media through information provided by the governmental entity? Is any entitlement to such hearing affected by the fact that he appealed the termination to the local Civil Service Commission alleging "[b]y this appeal I dispute the discharge and ask that the Commission rule that I am entitled to reinstatement", and thereafter, in the trial court below, no evidence was submitted by either side amplifying on the above statement?

2. Is Swartout entitled to a "property interest" due process hearing regarding his termination as a result of local ordinances? Is this court bound by a state court ruling as to the "property interest" implications of such ordinances?

CONSTITUTIONAL AND CITY ORDINANCE PROVISIONS INVOLVED

The 5th Amendment to the United States Constitution provides, in part:

> No person shall . . . be deprived of life, liberty or property, without due process of law. . .

The 14th amendment to the United States Constitution, Section 1, provides in part:

> . . . No state shall deprive any person of life, liberty, or property, without due process of law . . .

The Charter of the City of Spokane, Section 53(f) provides that the Spokane Civil Service Commission is empowered:

> (f) To provide for a period of probation not to exceed one year both on original and promotional appointments, before the appointment

is made permanent, during which time, in the case of an original appointment, the probationer may be discharged, or, in the case of a promotion, returned to a position in his former classification by the head of the department, board of office in which employed.

Section 53(l) further provides:

(l) To make and promulgate all Civil Service rules not inconsistent with this Article, and any amendments thereto, and to carry out and enforce the purpose of this Article, provided that the existing rules, insofar as the same may be consistent with the provisions of this Article shall remain in full force and effect. (. . .)

Section 55(d) further provides, in part:

(d) Any employee may be permanently discharged from City service for cause. The person making an order of suspension, reduction in rank or permanent discharge under Subdivisions (b), (c) or (d) hereof shall forthwith file with the Commission a statement of such order which shall contain the reasons therefor, and serve a copy of the order on the employee. Within 10 days after filing and service of said order, the employee may file a written appeal with the Commission who shall hold a hearing thereon within 10 days after filing the appeal. The Commission shall render its decision in writing within 10 days after the hearing. The Commission may sustain the order of suspension, reduction in rank or permanent discharge or may order the employee reinstated to his employment. Any reinstatement shall carry back salary from the date of the order of suspen-

> sion, reduction in rank or permanent discharge to date of reemployment. (. . .)

The Rules and Regulations adopted by the Civil Service Commission of the City of Spokane provide, in pertinent part:

Rule X, Sec. 1, provides in part:

> A permanent employee who has resigned in good standing may, within one year, submit a written request to the Commission for reemployment in his last permanent clasification and may, upon approval of the Commission, have his name placed at the bottom of an open eligible list for such classification for consideration during the remaining life of said list. Reemployment in this instance shall be considered as original entrance.

Rule V, Sec. 11 provides:

> (a) All original entrance appointments have a probationary period of one year which shall commence on the date of appointment to the classified position. The probationary period shall not include time served in a non-classified status except as provided in Section 4(d) of this rule. During this period, the appointing officer shall cause rating reports to be submitted to the Commission through the Personnel Director by the probationer's immediate supervisor and his appointment officer, on forms provided, attesting to the probationer proficiency, at the end of the 4th, 8th, and 11th months of the probationary period. Proficiency reports for a promotion probation shall be submitted at the end of the third and fifth months. The appointing officer, on each report, shall certify as to the proficiency of the probationer and shall

recommend either retention or removal. Upon receipt of the final report and expiration of the probationary period, the appointment shall be deemed complete and the probationer so notified.

(b) Removals. At any time during the probationary period the appointing officers shall remove a probationer found to be unsatisfactory. Submission of unsatisfactory proficiency reports also may be cause for removal of a probationer. The probationer, if on promotional probation, shall be returned to his former classification as provided in Rule VII, Section 3; or if by appointment from an original eligible list, shall be dropped from the service except as provided for transfers in Rule VIII, Section 2(a).

STATEMENT OF THE CASE

1. Nature of proceedings below:

Petitioner, Timothy Swartout, was discharged from the Spokane Police Department for allegedly falsifying reports. He appealed such discharge to the Civil Service Commission of the City of Spokane. The commission refused to conduct such hearing, and declined jurisdiction finding that Swartout had no appellate rights under City ordinances. Swartout filed for a Petition for Review under the provisions of **RCW** 7.16 asking the Superior Court for Spokane County to reverse the Commission's decision. The writ was later amended to include a request for relief by mandamus, if appropriate. Swartout alleged violation of state and federal due process rights, violation of the Spokane City Charter and further asserted entitlement to a hearing based on equitable estoppel. The trial court denied all relief. The Court of

Appeals, Division III, affirmed. A Petition for Review to the State Supreme Court was denied.

2. Statement of Facts:

Tim Swartout was employed by the City as a police officer for approximately four and a half years, from 1972 to July of 1976. (CP 43). At the time of his resignation in July of 1976 he was an officer in good standing with the rank of Patrolman. (RP 14) Upon resigning from the force, with his superior's encouragement, Swartout put his name on the eligibility list with the Civil Service Commission for policemen. (CP44) Rule X, Sec. 1 of the Civil Service rules permitted this procedure, which obviated the need for re-application and retaking the Civil Service exam.

In October of 1977, Swartout was informed that his name had come up on the eligibility list and he could resume duties with the Spokane Police Department. (RP 14) At the time he was informed he could rejoin the Police Department, Swartout was not aware that the City would consider his status upon reentry to be "probationary". (RP 14-15) He finally became aware of this fact shortly before actually commencing work again and took immediate steps to see what, if any right, he had to challenge such designation. (RP 8-9)

Swartout resumed duties at the same level at which he left — that of Patrolman. He had previously completed a probationary period at that level.

Upon his reappointment, he served as a Spokane Police Officer from October 30, 1977, to January 27, 1978, at which time he was issued a notice of termination by the Chief of

Police accusing him of filing false reports while in the line of duty. The "reports" involved related to verification of contact with local citizens and distribution of materials on crime prevention under a "Neighborhood Watch" program. (CP 44-45; CP 11-23). This formal action by the Chief of Police was preceded by an informal review of the allegations by an intra-departmental board known as the "Disciplinary Review Board." This Board heard testimony, not under oath, without either Swartout's presence or right of confrontation, and had recommended to the Chief, as a result of its investigation, that Swartout be **suspended** for a limited period of time. (CP 45; RP 39) The respondents stipulated below that this hearing was not a "due process" hearing. The Review Board hearing was not open to the public (RP 55) and in fact there was the policy that such proceedings were not to be discussed other than among Review Board members, both during and after its deliberations. (RP 38) Despite such policy, a reporter from a local newspaper obtained information informally from members of the Spokane Police Department with respect to the Review Board proceeding and its outcome. (CP 45; RP 60-64) Thereafter, the same reporter obtained confirmation of the disciplinary board proceedings and their outcome from the Chief of Police. (RP 60-64). Subsequent to the delivery of the January 27, 1978, discharge letter, the discharge and the alleged reasons for it were widely publicized in local press and media. (CP 45; plaintiff's exhibit no. 1; RP 3-7; 11-13) In at least one instance, the principal morning newspaper for the Spokane area erroneously reported that the Disciplinary Review Board had recommended the discharge. (Ibid.) Erroneous radio reports to this effect were also broadcast. (RP 12-13; Ex.#1) On February 3, 1978, Swartout filed a Notice of Appeal to the Spokane Civil Service Commission asking that it review, through its hearing process, his dis-

charge. (CP 3-8; 45; 51) The text of that letter provided in pertinent part:

> By this appeal I dispute the discharge and ask that the Commission rule that I am entitled to reinstatement.

(CP 51)

On February 21, 1978, the Civil Service Commission met and determined not to honor the appeal on the basis that it lacked jurisdiction by virtue of Swartout's "probationary status". The trial and appellate court agreed with this determination and denied Swartout's claim that he had a right to a due process hearing by virtue of either a "liberty" or "property" interest.

It was undisputed in the case that Swartout had completed one probationary period at the level of Patrolman. It was further undisputed that at the time he reentered service as a Police Officer for the City he was past the maximum age for original entry employees. (RP 16; 43).

At the hearing before the Superior Court, Swartout's Notice of Appeal before the Civil Service Commission was admitted into evidence. Other than admission of this document, no evidence was submitted by Swartout as to his contentions regarding the basis for discharge. The City did not cross-examine him regarding his Notice of Appeal or the alleged events for which he was discharged.

REASONS FOR GRANTING THE WRIT

1. "Liberty Interest";

This case involves a simple question of whether petitioner has met the requirements of **Board of Regents v. Roth,** 408 U.S. 564 (1972), **Bishop v. Wood,** 426 U.S. 341 (1976) and **Codd v. Velgar,** 429 U.S. 624 (1977) and is entitled to a due

process hearing regarding his discharge from public employment as a police officer.

It is clear petitioner was terminated for reasons affecting his good name reputation and honor. It is also clear, through no fault of petitioner and despite a police department policy to the contrary, that police provided information to the press and media which was widely publicized regarding the discharge and alleged basis for it. Lastly, Swartout has never had a due process hearing regarding these charges or the penalty imposed. Despite these facts the state court, relying on **Codd,** found no "liberty interest" right because Swartout did not "challenge the accuracy of [the] charges." 25 Wn. App. at 184. This was error. In **Codd** this court looked for "some factual dispute between [the] employer and discharged employee which has some significant bearing on the employee's reputation." 429 U.S. at 627. It search for such indicia "in his pleadings or elsewhere". **Ibid.**

In his appeal document to the Civil Service Commission Swartout, however briefly, asserted a dispute and requested reinstatement. This was a matter of record, as an exhibit, before the state court. The City did not attempt to probe for particulars. Unless this Courts expands **Codd** to require defendant to disclose with particularity his defense **Codd** requires a reversal of the state court.

A separate and distinct issue left unresolved by **Codd** is whether a challenge to the **severity** of the disciplinary action has "liberty interest" implications. In **Codd** this court, while distinguishing **Morrisey v. Brewer,** 408 U.S. 471 (1972), found absent any "second step" relating to the severity of disciplinary sanctions. Here the Police Chief disregarded an advisory

opinion of the Disciplinary Review Board that Swartout be suspended. Given the severe effect a discharge from public service has on one's career **Codd** should protect challenges to severity of disciplinary action where a legitimate dispute exists.

There is a need for this Court to clarify its rulings in **Codd** and **Bishop.** Public employees should be clearly informed an "allegation" of dispute is no longer enough. **Codd, supra,** 429 U.S. at 627.

2. "Property Interest"

Petitioner asserted below that the provisions of the City Charter of Spokane provided a "property interest" in Swartout which could not be divested without a due process hearing. The crux of this claim was based on "Section 53(f) of the Charter, which permitted "a period of probation not to exceed one year". It was admitted that Swartout had previously completed such a probationary period at the level of patrolman at the time of his rehiring, and he therefore contended he was entitled to permanent status — which required notice and appellant rights before termination. The respondent asserted, and the State Court found, that Commission Rule X, Sec. 1 allowed for a new probationary period on re-entry. The State Court rejected Petitioner's claim that this rule constituted an unlawful amendment to the city charter and thus was void under applicable state law. **See State ex rel. Ausburn v. Seattle,** 190 Wash. 222, 67 P.2d 913 (1937); **Allard v. Tacoma,** 176 Wash. 441, 29 P.2d 698 (1934). Swartout asserted below that the City Charter could only be amended by referendum (Article XIV, Sec. 125). He contended the people had been disenfranchised and he had been fired without proper notice or a hearing, and therefore the city's acts were void.

Petitioner asserts that this ruling by the State Court has a "federal dimension", **Bishop supra,** 426 U.S. at 353 (Brennan, J., dissenting) and should be reviewed. This court should undertake an independent examination of a federal "property interest" claim where the "local issue" is resolved by reference to standard rules of construction which transend local considertions. Such is the case here. The State court erroneously found no expectation of employment under **Roth,** and this court should review this determination. Alternately, Swartout asserts the State court's conclusion that Rule X, Sec. 1 is consistent with Charter, Section 53(f) is under **Bishop, supra,** 426 U.S. at 347 "untenable", and therefore reviewable.

CONCLUSION

For the foregoing reasons, petitioner Timothy V. Swartout respectfully requests that this court grant his writ of certiorari and review on the merits the state court finding he is not entitled to a due process hearing under either a "liberty interest" or "property interest" standard.

Respectfully submitted:

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"APPENDIX A"

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE ex rel. TIMOTHY V. SWARTOUT,

Appellant,

v.

CIVIL SERVICE COMMISSION OF THE CITY OF SPOKANE,

Respondent.

No. 3399-III-6

Division Three
Panel Four

Filed January 15, 1980

McINTURFF, J. — This is an appeal from a decision of the superior court affirming the Civil Service Commission's refusal to entertain the appellant's, Timothy Swartout's request for a hearing following his discharge from the Spokane police department.

Timothy Swartout was employed by the City of Spokane as a police officer for approximately 4½ years when he voluntarily resigned in July 1976. At the time of his resignation, Mr. Swartout, having attained the status of a "permanent employee," requested that his name be placed on the Civil

Service Commission's employment eligibility list. In accordance with his request, Mr. Swartout's name was placed at the bottom of the list, and as prior names were exhausted, Mr. Swartout's name advanced to the top of the list.

Mr. Swartout became eligible for reemployment as a police officer in October 1977. He accepted the position and submitted to the required physical and polygraph examinations. Before he returned to active service, Mr. Swartout learned of his civil service classification as a "probationary employee." His salary was based upon his status as an "original entrant." Thereafter, Mr. Swartout was assigned to duties and responsibilities commensurate with his experience.

Within a few months after he had returned to work, Mr. Swartout was charged with filing false activity reports. These allegations were reviewed by an informal intra-departmental body known as the Disciplinary Review Board. The Board recommended Mr. Swartout's suspension. The recommendation, however, was not binding on the Chief of Police, who discharged Mr. Swartout by letter dated January 27, 1978. Although the proceedings of the Disciplinary Review Board are governed by a policy of confidentiality, news of Mr. Swartout's discharge leaked to the press and was reported by the local media.

On February 3, 1978, Mr. Swartout appealed his discharge to the Civil Service Commission. The Commission declined to hear the appeal, finding it was without jurisdiction to review the discharge of a "probationary employee." Mr. Swartout then applied for a writ of review, which was granted by the superior court. Finding no error, the superior court affirmed the decision of the Civil Service Commission and this appeal followed.

First, we must decide whether Mr. Swartout was discharged in a manner consistent with the provisions of the Charter of the City of Spokane.

Mr. Swartout contends the City Charter provides a right of appeal for **all employees** of the City. This argument derives its authority from Article VI, Section 55, of the Charter:

> *An employee may be suspended, reduced in rank or discharged only by the city commissioner* in whose department the employee is employed, or the city manager, if the mayor-council-manager form of government is adopted, as follows: . . . (d) Any employee may be permanently discharged from city service for cause. The person making an order of suspension, reduction in rank or permanent discharge under Subdivisions (b), (c) or (d) hereof shall forthwith file with the commission a statement of such order which shall contain the reasons therefor, and serve a copy of the order on the employee. Within ten days after filing and service of said order, the employee may file a written appeal with the commission who shall hold a hearing thereon within ten days after filing the appeal.

(Italics ours.) We would agree with Mr. Swartout's argument if the language producing this grant of appellate authority was not preceded by Article VI, Section 53, entitled "Powers and Duties of Commission." Subsections (a) and (f) contain specific provisions relating to the classification and treatment of probationary employees. They provide, in part:

> The commission shall be required to advise the city council and its administrative officers on all matters relating to Civil Service in the city service and shall have the power and duty:

> (a) To classify all positions of the city . . . Positions heretofore or hereafter classified shall constitute the classified service and no appointments or promotions shall be made to any such positions except in the manner provided by this Article and the rules of the commission.
>
> . . .
>
> (f) *To provide for a period of probation not to exceed one year both on original and promotional appointments, before the appointment is made permanent, during which time, in the case of an original appointment, the probationer may be discharged,* or, in the case of a promotion, returned to a position in his former classification *by the head of the department, board or office in which employed.*

(Italic ours.)

Mr. Swartout contends these respective Charter provisions are irreconcilable. We disagree. As noted by the court in **Tacoma v. Civil Service Board of Tacoma,** 6 Wn. App. 600, 601, 494 P.2d 1380 (1972), the general purpose of a probationary period within the concept of the Civil Service structure is to give the appointing official an opportunity to determine whether the probationer is efficient and competent. In reconciling these charter provisions, a reasonable interpretation of Section 53(f) is that the Civil Service Commission is granted authority to hear appeals from any employee who has achieved permanent status, not one who is a probationary employee. This interpretation preserves the general scheme of the Civil Service Commission program and gives meaningful significance to Section 53(f), which declares that in the case of probationary employees, whether original or promotional, the head of the department, in this case, the Chief of Police, may discharge the probationer before the appointment is

made permanent.[1] **See Tacoma v. Civil Service Board of Tacoma, supra** at 605. To hold otherwise would negate the intent of the probationary period which is to simplify the discharge procedures for employees who are found to lack the qualifications necessary for permanent employment.

Next, Mr. Swartout contends his discharge was without legal effect because of a conflict between the rules of the Civil Service Commission and the provision of the City Charter.

As previously noted, the City Charter directs the Civil Service Commission to provide for a period of probation not to exceed one year for both original and promotional appointments. Article VI, Section 53(f). The pertinent Civil Service rule provides:

> X. A permanent employee who has resigned in good standing may, within one year, submit a written request to the Commission for reemployment in his last permanent classification and may, upon approval of the Commission, have his name placed at the bottom of an open eligible list for such classification for consideration during the remaining life of said list. *Reemployment in this instance shall be considered as original entrance.*

(Italics ours.)

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[1]In construing Section 53(f) the first phase speaks of both original and promotional appointments; then it states "in the case of an original appointment, the probationer may be discharged," but there is no designation of the official authorized to discharge the probationer. Next, the section says, "In the case of a promotion, returned to a position in his former classification by the head of the department, . . ." Although it would be more clear if a comma had been placed between the words "classification" and "by", a reasonable construction of Section 53(f) is that the probationer would also be discharged by the head of the department. **See** Tacoma City Charter, Section 6.14 (f) which is referred to in **Tacoma v. Civil Service Board of Tacoma,** 6 Wn. App. 600, 602-03, 494 P.2d 1380 (1972). This provision is very similar to Section 53(f) in the instant case — where a comma appears between the words "classification" and "by" as we have suggested above.

By virtue of his previous 4½ years of service with the police department, Mr. Swartout contends he has already successfully completed the required probationary period, and had attained the status of a classified, permanent employee prior to his voluntary resignation. Thus, he should not have been classified as a probationary employee when he rejoined the police department in October 1977. Because there is no specific provision under the Charter requiring a new probationary period upon reemployment, Mr. Swartout contends Civil Service Rule X constitutes an unlawful amendment to the City Charter, or is a requirement inconsistent with the City Charter. We disagree.

> The Civil Service Commission cannot, by rule, modify or repeal a provision of the City Charter or enact rules not authorized by the power creating the commission.

State ex rel. Ausburn v. Seattle, 190 Wash. 222, 237, 67 P.2d 913 (1937); **accord State ex rel. Olson v. Seattle,** 7 Wn.2d 379, 384, 110 P.2d 159 (1941). Under Article VI, Section 53(1), the Civil Service Commission is directed to promulgate those rules necessary to carry out the purposes of the Civil Service provisions of the City Charter.[2] As we have already noted, the purpose of a probationary period is to allow the appointing official an opportunity to evaluate the competency of the probationer before his appointment is made permanent. This principle applies equally to novice police officers, promo-

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[2]Article VI, Section 53(1):

"To make and promulgate all Civil Service rules not inconsistent with this Article, and any amendments thereto, and to carry out and enforce the purpose of this Article, provided that the existing rules, insofar as the same may be consistent with the provisions of this Article, shall remain in full force and effect. . . ."

tional appointees and those experienced police officers who voluntarily resign from the force but subsequently apply for remployment.

The Civil Service Commission could reasonably conclude that the time spent outside of active service may affect the officer's qualifications to once again be a permanent employee. Thus, even in the case of a police officer with prior experience, the appointing official should be given the opportunity to evaluate the officer in light of his present abilities before he is made a permanent employee. This conclusion is also consistent with the rights and interests of those police officers who have become permanent employees through continuous service with the police department. Rule X is not an amendment to the City Charter, nor is it inconsistent therewith.

Next, Mr. Swartout contends the City is estopped from denying his status as a permanent "classified employee." The basis for this contention is that upon returning to the police department in October 1977, Mr. Swartout was not required to undergo police academy training and was given responsibilities normally associated with those of an experienced, permanent police officer.

For equitable estoppel to arrise, there must be an admission, statement, or act inconsistent with the claim afterwards asserted. **McCollough v. Cashmere School Dist. No. 222,** 15 Wn. App. 730, 737, 551 P.2d 1046 (1976). The evidence supports Mr Swartout's contention that he was regarded by his superiors as an experienced police officer. However, before he returned to the department, Mr. Swartout was informed of his probationary status. The terms of his employment, includ-

ing wages, clothing allowances, qualifying physical and polygraph examinations, were consistent with his status as a probationary employee and, thus, an original entrant as required by Rule X of the Civil Service Commission.

This conclusion is also consistent with the respective functions of the Civil Service Commission and the police department. The Civil Service Commission administers examinations, prepares eligibility lists and determines the classification or status of employees certified to the police department. The police department cannot change the Civil Service Commission's employee classification, but this does not preclude the department from utilizing the employee's services to the extent his abilities permit. Since Mr. Swartout had already undergone training at the police academy, there was no advantage in requiring him to undergo the same training a second time. Similarly, given his prior experience as a police officer, necessity did not demand the oral examination customarily given to novice police officers. The purpose of the oral examination is to determine a novice applicant's suitability for police work. We find no material inconsistency in the way Mr. Swartout was treated upon returning to police employment.

Mr. Swartout contends it was error to permit the director of the Civil Service Commission to give his opinion regarding the interpretation and application of the City Charter and implementing Civil Service Commission rules. We disagree.

> [I]n the construction of statutues and ordinances, as well as resolutions of municipal corporations, the court should give great weight to the contemporaneous construction of an ordinance or resolution by the official charged with its enforcement.

Cramer v. Van Parys, 7 Wn. App. 584, 587, 500 P.2d 1255 (1972).

Next, we must decide whether Mr. Swartout was discharged in a manner consistent with the due process guarantees of our state and federal constitutions. This question raises two basic issues: (1) whether Mr. Swartout's employment status was a "property interest" protected by the due process clause; and (2) whether the reasons given for Mr. Swartout's discharge deprived him of an interest in liberty protected by the due process clause.

PROPERTY INTEREST

A property interest in employment is created and defined, not by the Constitution, but by rules which stem from state law.[3] In this state, there is no constitutional "property" interest in public employment.[4]

Mr. Swartout's rights stem from the Civil Service law. As we have seen, there is no right of appeal for a "probationary employee" under either the City Charter or the rules of the Civil Service Commission. Thus, while Mr. Swartout may entertain some abstract or unilateral expectation regarding his rights upon discharge, he did not have a "property" interest in his employment sufficient to require the Civil Service Commission to give him a hearing upon his discharge by the Chief of Police.

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[3]**Bishop v. Wood,** 426 U.S. 341, 48 L. Ed. 2d 684, 690, 96 S. Ct. 2074 (1976); **Board of Regents v. Roth,** 408 U.S. 564, 33 L. Ed. 2d 548, 561, 92 S. Ct. 2701 (1972); **Giles v. Department of Social & Health Services,** 90 Wn.2d 456, 460, 583 P.2d 1213 (1978).

[4]**Giles v. Department of Social & Health Services, supra** at 461; **Olson v. University of Washington,** 89 Wn.2d 558, 564, 573 P.2d 1308 (1978); **Reynolds v. Kirkland Police Commission,** 62 Wn.2d 720, 384 P.2d 819 (1963); **Yantsin v. Aberdeen,** 54 Wn.2d 787, 788, 345 P.2d 178 (1959).

LIBERTY INTEREST

Liberty denotes not only freedom from bodily restraint, but also the right of the individual to contract and to engage in any of the common occupations of life. **Board of Regents v. Roth,** 408 U.S. 564, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972). In the employment context, the term "liberty" encompasses two of the employee's most basic interests, namely, his good name and his prospects for future employment. Thus, if the government dismisses an employee on charges that call into question his good name, honor or integrity, notice and an opportunity to be heard are essential. **Board of Regents v. Roth, supra** at 33 L. Ed. 2d 556, and cases cited. Similarly, the government cannot, by its actions, impose a stigma or other disability upon an employee which will foreclose his freedom to pursue other employment opportunities. **Board of Regents v. Roth, supra.**

Mr. Swartout contends that because the police department was responsible for public disclosure of the allegation that he had been discharged for falsifying reports, his good name and reputation have been stigmatized, thus infringing upon liberty interests protected by the due process clause. We disagree.

The proceedings of the disciplinary review board are confidential. Information regarding Mr. Swartout's discharge leaked to the press from unknown sources. A local reporter consulted the Police Chief, but he refused to comment except to correct the reporter regarding the recommendation of the disciplinary review board — suspension rather than discharge. Public disclosure was inadvertent and there is no claim or evidence that the leak was the product of malice on the part of the police department or an intent to deprive Mr. Swartout of his constitutional rights.

More importantly, Mr. Swartout has not denied the truth of the charges leading to his dismissal. The absence of any such allegation or finding is fatal to his claim that he is entitled to a hearing under the due process clause.

> "The purpose of such notice and hearing is to provide the person an opportunity to clear his name." . . . But if the hearing mandated by the Due Process Clause is to serve any useful purpose, there must be some factual dispute between an employer and the discharged employee which has some significant bearing on the employee's reputation.

(Citations omitted.) **Codd v. Velger,** 429 U.S. 624, 51 L. Ed. 2d 92, 96, 97 S. Ct. 882 (1977).

Mr. Swartout's statement in his notice of appeal, "by this appeal I dispute the charge and ask that the Commission rule that I am entitled to reinstatement." is not adequate to raise an issue as to the accuracy of the charge. He had an opportunity in superior court to deny the charges of falsifying reports, but remained silent. Because Mr. Swartout does not challenge the accuracy of these charges, there is no suggestion or evidence that a hearing would produce the result he desires — clearing his name.

Mr. Swartout next argues he should have had an opportunity to challenge the severity of the disciplinary sanction. Again, we disagree. Since Mr. Swartout had no property interest in continued employment,

> the adequacy or even the existence of reasons for failing to rehire him present no federal constitutional question. Only if the employer *creates and disseminates a false and defamatory impression* about the employee in connection with his termination is such a hearing required . . .

(Italics ours. Citations omitted.) **Codd v. Velger, supra** at 51 L. Ed. 2d 97. Again, the charges are undenied.

Mr. Swartout's liberty interests receive no greater protections under the state constitution, our courts having adopted principles identical to those enunciated by the United States Supreme Court. **Giles v. Department of Social & Health Services,** 90 Wn. 2d 457, 461, 583 P.2d 1213 (1978). The fact that Mr. Swartout may carry the stigma of having been discharged for filing false reports is not the fault of the police department. As the court observed in **Giles** at 461:

> Nearly any reason assigned for dismissal is likely to have some negative reflection on an individual. However, not every dismissal assumes a constitutional magnitude.

The police department has taken no affirmative action to foreclose Mr. Swartout's future employment opportunities.

Judgment of the superior court is affirmed.

APPENDIX "B"

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE ex rel. TIMOTHY V. SWARTOUT,

Appellant,

v.

CIVIL SERVICE COMMISSION OF THE CITY OF SPOKANE,

Respondent.

No. 3399-III-6

Division Three

ORDER DENYING MOTION FOR RECONSIDERATION

The Court has considered the Motion for Reconsideration in the above-captioned case, and that Motion is denied.

DATED this 5th day of February, 1980.

BY THE COURT:

Dale M. Green
Chief Judge

APPENDIX "C"

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE ex rel. TIMOTHY V. SWARTOUT,

Appellant,

v.

CIVIL SERVICE COMMISSION OF THE CITY OF SPOKANE,

Respondent.

MANDATE

No. 3399-III-6

Spokane County No. 244970

Pursuant to Notation Order by
Supreme Court denying Petition
for Review on April 3, 1980.

The State of Washington to: The Superior Court of the State of Washington in and for Spokane County.

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division III, filed on January 15, 1980, became the decision terminating review of this court in

the above entitled case on April 3, 1980. This cause is mandated to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Spokane, this 8th day of April, 1980.

Frank V. Slak, Jr.

Clerk of the Court of Appeals,
State of Washington Division III

Supreme Court, U. S.
FILED
SEP 24 1980
MICHAEL RODAK, JR., CLERK

No. 79-2078

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1980

TIMOTHY V. SWARTOUT,

Petitioner,

v.

CIVIL SERVICE COMMISSION OF CITY OF SPOKANE, and COUNTY OF SPOKANE,

Respondents,

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

JAMES C. SLOANE
CORPORATION COUNSEL

CHRISTINE CARY
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ATTORNEYS FOR RESPONDENTS

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The Civil Service Commission of the City of Spokane, respondent, respectfully submits that the decision of the Court of Appeals, Division III of the State of Washington, entered the correct decision in this proceeding on January 15, 1980.

OPINION BELOW

See Petitioner's Brief.

JURISDICTION

See Petitioner's Brief.

CONSTITUTIONAL PROVISIONS, CHARTER PROVISIONS OF THE CITY OF SPOKANE, RULES AND REGULATIONS OF CIVIL SERVICE COMMISSION.

The provisions cited in petitioner Swartout's Petition for a Writ of Certiorari are improperly entitled City Ordinance. It is important to note that the provisions are from the Charter of the City of Spokane, and are not ordinances. The Charter provisions are otherwise set out verbatim.

QUESTIONS PRESENTED FOR REVIEW

1. Is the Civil Service Commission of the City of Spokane required to give all employees an appeal from a discharge even though there is no statutory provision for such a hearing?

2. Is the publication of a discharge of an employee a violation of his "liberty interest" even though the employer did not disseminate the information?

3. Is it necessary for the employee to refute the charges that were publicized in order to invoke the right to a name-clearing hearing? If there is no factual dispute, did the employee suffer a constitutional deprivation?

STATEMENT OF THE CASE

1. Nature of proceedings below:

Petitioner, Timothy Swartout, was employed by the City of Spokane, respondent, as a Police Officer. He was terminated from employment with the City after three

months.

He filed a letter requesting an appeal from his discharge with the Civil Service Commission. The Commission declined jurisdiction to hear the appeal of Swartout on the basis that he was a probationary employee of the City. Swartout has referred to City ordinances in his Statement of the Case. In fact, there were no ordinances involved, but rather City Charter provisions.

Swartout made an application for Writ of Review to the Superior Court for Spokane County. The finding of the Superior Court was that Swartout was terminated in a manner consistent with Federal and State Constitutions, the Charter of the City of Spokane, the rules of the Civil Service Commission, and that the decision of the Civil Service Commission in denying jurisdiction to hear the appeal was proper. The Court of Appeals, Division III,

affirmed the judgment of the Superior Court. A Petition for Review to the State Supreme Court was denied.

2. Statement of Facts:

Petitioner, Timothy V. Swartout, was employed by the City of Spokane as a Police Officer on October 30, 1977 (CP 44). Three months later, on January 27, 1978, he was discharged by the Police Chief for falsifying reports (CP 45). He filed a letter requesting an appeal from his discharge with the Civil Service Commission. The Commission declined jurisdiction to hear the appeal of Swartout on the basis that he was a probationary employee of the City of Spokane and because of this probationary status, not entitled to an appeal (CP 46).

At a prior time, Swartout had been a Police Officer for the City for a period of 4-1/2 years (CP 43). During that time he served a probationary period of one

year and then achieved permanent status as an employee of the City. However, he voluntarily resigned from that position, and from further employment with the City in July, 1976 (RP 23). At the time of his resignation, Swartout requested that his name be placed on an eligibility list (RP 23). His name was put on that list and approximately one year later he was informed that his name had advanced to the top of the list. He was told that he could be hired by the police department at that time (CP 44). Before being hired, he was required to have a physical examination and to take a polygraph examination (RP 53). These are customary tests for all original applicants to the Police Department (RP 53). Swartout questioned his status and was informed that he would be on probationary status (RP 26). He accepted the position and began working October 30, 1977. He was paid the same

amount as other probationary employees in the Police Department and he was not granted a uniform allowance, as are permanent employees (RP 27). Swartout was under no obligation to take the position as police officer (RP 49), but when he accepted the offer of employment it was not as a continuation of prior employment but rather as an original entrant, and thus as a probationary employee (RP 74). Swartout knew this at the time he accepted the position with the City (RP 14-15).

After a period of approximately three months of employment, Swartout was charged with filing false reports, and on January 29, 1978, was discharged.

The fact of his discharge was reported in the Spokane Chronicle on January 31, 1978, and was repeated in the Spokesman-Review on February 1, 1978 (CP 45). This was not the result of an intent by the City to release the information to the

media (RP 44). Rather, the press was able to gather the information from other sources and put together a story (RP 47). The Chief of Police was asked to make a statement and he initially declined to do so. The reporter then read the Chief the story that he was going to print (RP 38, 48), and a correction was made by the Chief in an attempt to protect Swartout by providing accuracy (RP 48). There was no other communication between the City and the media (RP 44). There was no malice towards Swartout, and no intent to deprive him of his rights (RP 44).

ARGUMENT FOR DENYING THE WRIT

1. PROPERTY INTEREST:

A property interest in employment is created and defined not by the Constitution, but by the rules which stem from state law. Bishop v. Wood, 426 U.S. 341, 96 S.Ct. 2074 (1976). There is no due

process right to appeal for a public employee of the State of Washington, but rather ". . . only those rights and priviledges of public employees created by statute are protected by the due process clauses of the State and Federal Constitutions." Olsen v. University, 89 Wn.2d 558, 564 (1978) citing Yantsin v. Aberdeen, 64 Wn.2d 787, 345 P.2d 178 (1959). "There is no vested property right to public employment." Olsen v. University, supra at 564. The law applicable to Swartout is the Charter of the City of Spokane which created the applicable Civil Service rights. The Charter of the City of Spokane does not provide the right to appeal a discharge to a probationary employee. The property interest created by the Charter of the City of Spokane, Article VI, Section 53(f), is only for those employees who pass a one year probationary period. Swartout was afforded his rights under

Charter provisions and Civil Service Rules implementing those provisions; however, as a probationary employee, those statutory rights do not include the right to an appeal of a discharge from employment. The federal court should not become the forum which must review every personnel decision that is made by public employers. This would inevitably become the result of creating a federal common law of property rights which includes a right to public employment. The citizens of the City of Spokane may create that right by changing the City Charter.

2. LIBERTY INTEREST:

Swartout indicated that he was denied due process because of the publicity that accompanied his discharge from the Police Department. The right protected by the due process clause to which petitioner refers is the interest in liberty, that liberty being defined as a person's

interest in his good name, reputation, honesty or integrity. Bishop v. Wood, 426 U.S. 341, 96 S.Ct. 2074 (1976). However, this Court refined the right to a hearing for loss of liberty to those instances when the public employer is "motivated" by a desire to curtail or to penalize the exercise of the employee's constitutionally protected rights. Bishop v. Wood, supra at 96 S.Ct. 2080.

There has been no claim by Swartout that the City publicized the discharge, or that there was any motivation or intent to deprive him of a constitutional right. In fact, the City was extremely careful to protect Swartout from false reports, and did not initiate any release of information pertaining to the discharge.

This Court has held in Codd v. Velger, 429 U.S. 624, 97 S.Ct. 882 (1977) that where a nontenured employee has been stigmatized in the process of terminating

his employment, he is entitled to a hearing, solely for the opportunity to clear his name.

> But if the hearing mandated by the Due Process Clause is to serve any useful purpose, there must be some factual dispute between an employer and a discharged employee which has some significant bearing on the employee's reputation. Codd v. Velger, 97 S.Ct. at 884.

Nowhere in the pleadings has Swartout asserted that the reason for his discharge was false. In his notice of appeal to the Civil Service Commission he stated "by this appeal I dispute the discharge and ask that the Commission rule that I am entitled to be reinstated." This statement is not a denial of falsifying reports. It is merely "disputing the discharge," not the actual charge itself.

The trial court recognized that at no time during the trial did Swartout contend that the allegations, which were the basis of his discharge in January, 1978,

were untrue or that he wished to refute them. The conclusion of the trial court was that Swartout was not entitled to an appeal before the Civil Service Commission by virtue of alleged violations of a "property interest" or "liberty interest" under the United States or Washington Constitutions. Since Swartout does not challenge the truth of the charges made, no hearing can possibly achieve the result of clearing his name.

> When we consider the nature of the interest sought to be protected, we believe the absence of any such allegation or finding is fatal to respondent's claim under the Due Process Clause that he should have been given a hearing. Codd v. Velger, 97 S.Ct. at 884.

Even in Bishop v. Wood, 426 U.S. 341, 96 S.Ct. 2074 (1976), a hearing was required only if the employer disseminated a false impression about the employee.

In Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701 (1972), this court

stated that the liberty interest could be infringed if the government imposed a stigma that foreclosed the employee from other employment. It has not been shown by Swartout that he has been unable to obtain employment, or that the City attempted to deprive him from employment elsewhere.

Due process requires a hearing on the discharge of a public employee only if the employer creates and disseminates a false impression about the employee in connection with his termination. There was no identification made by Swartout of a false statement. He never refuted the charge of falsifying records.

CONCLUSION

The respondents, City of Spokane and Civil Service Commission of the City of Spokane, submit that the decision of the Court of Appeals, Division III, of the State of Washington is correct and

that Petitioner's request for Writ of Certiorari be denied.

Respectfully submitted,

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